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Chapter 5:
Right to Counsel in Criminal Cases

5. RIGHT TO COUNSEL (6th Amendment, *Miranda* not covered)

5. 1 When Does Right to Counsel Exist - The right to counsel begins at the ***Initiation of Prosecution*** and thereafter covers any ***Critical Stage*** of the prosecution.

A. ***Initiation of Prosecution***

1. General test - The U.S. Supreme Court has offered two general descriptions of when prosecution has been initiated:
   a. Defendant has been "immersed in the intricacies of substantive and procedural criminal law" [McNeil v. Wisconsin, 501 U.S. 171 (1991)];
   b. Government has committed itself to prosecute, and the adverse positions of government and defendant have been solidified [U.S. v. Gouveia, 467 U.S. 180 (1984)].
2. Grand Jury proceedings - Pre-arrest grand jury proceedings are generally not thought to constitute the initiation of a criminal prosecution.
3. Warrantless arrests do not initiate prosecution [U.S. v. Gouveia, 467 U.S. 180 (1984)].
4. Arrest with a warrant - authority is split here but the Eleventh Circuit has held that this is not the initiation of prosecution [United States v. Moore, 122 F.3d 1154 (8th Cir., 1997), cert. den. 522 U.S. 1135 (1997) (arrest warrant); United States v. Langley, 848 F.2d 152 (11th Cir., 1988) (per curiam); but see Meadows v. Kuhlmann, 812 F.2d 72 (2nd Cir., 1987), cert. den. 482 U.S. 915 (1987)].
5. Pre-arrest probable cause hearing - no case has been decided on this.
6. Initial appearance hearing - A first appearance hearings is ***now*** recognized to initiate prosecution - this does not make it a "critical stage"- but non-judicial activities after the hearing such as ***interrogation*** or line-ups would be critical stages [O'Kelley, 278 Ga. 564, 604 SE2d 509 (2004); Rothgery v. Gillespie County, 554 U.S. 191 (2008)].

CAUTION - Montejo v. Louisiana, ___ U.S. ___, 129 S. Ct. 2079, 173 L.Ed.2d 955 (2009) overrules Michigan v. Jackson, 475 U.S. 625 (1986), as to the waiver of Sixth Amendment rights. Montejo permitted the interrogation of the defendant by police after the appointment of counsel after a Miranda rights waiver. It is unclear what waiver, if any, would be required for a defendant not in custody, or how waiver would operate for other non-court "critical stages" such as line-ups. A State agent who is an attorney, however, cannot circumvent acting through counsel (Georgia Rules of Professional Conduct § 4.2), and Monetjo should not be viewed as affecting the Court's responsibilities to assure that any waiver of counsel with respect to court-related activities is knowing and intelligent. (See **5.3**)

7. Preliminary hearings - prosecution has clearly been initiated [Coleman v. Alabama, 399 U.S.1, 9 (1970); accord, Houston, 234 Ga. 721, 722-23, 214 SE2d 893 (1975); Mitchell, 173 App. 480, 327 SE2d 537 (1985); Watson, 244 App. 484, 536 SE2d 170 (2000); Camphor, 272 Ga. 408, 410 (2a), 529 SE2d 121 (2000)].

B. ***Critical stage of the prosecution***

1. The Supreme Court has defined "critical stages" as "proceedings between an individual and agents of the State (whether 'formal or informal, in court or out,' see United States v. Wade, 388 U.S. 218, 226 (1967)), that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary.'" [Rothgery v. Gillespie County, 554 U.S. 191 (2008)].
   Most judicial proceedings are considered a critical stage of the prosecution; however, proceedings which deal only with bond and scheduling matters, are not critical stages [see Simmons, 260 Ga. 92, 390 SE2d 43 (1990)]. Critical stages for which counsel must be provided include:
   a. Preliminary hearings (see A(7) above);
   b. Entering a plea [Larry v. Hicks, 268 Ga. 487, 491 SE2d 373 (1997)];
   c. Sentencing or re-sentencing;
   d. Trial
      - Jury communications - to review and comment on appropriate instructions [*see* Lowery, 282 Ga. 68, 646 SE2d 67 (2007) (prospectively requires jury comments in writing as court exhibit and that counsel be allowed to suggest instructions in response)].
   e. Restitution hearing - under facts of case restitution hearing determination was not ministerial and it was error to refuse defense counsel the right to participate and cross-examine witnesses (Defendant was not present) [Gibson v. State, 319 Ga.App. 627, 737 SE2d 728 (2013)].
   f. Seeking to withdraw a plea [Fortson, 272 Ga. 457, 532 SE2d 102 (2000) (same term); Schlau, 261 App. 303, 582 SE2d 243 (2003)], at least if the motion is within term [Murray, 265 App. 119, 592 SE2d 898 (2004); *see also* Kane, 265 App. 250, 593 SE2d 711 (2004) (no right where issues could only be raised in habeas)];
   g. Motion for new trial [Babb, 252 App. 518; 556 SE2d 562 (2001)];
   h. Non-summary ***criminal contempt*** (where contempt is not direct - in judge's presence - or the hearing is postponed) [Merritt, 261 App. 597, 583 SE2d 283 (2003) (non-party (juror))];
   i. Appeal, including seeking to file a late appeal [Murray, 265 App. 119, 592 SE2d 898 (2004); Kane, 265 App. 250, 593 SE2d 711 (2004); *but see* Orr v. State, 276 Ga. 91, 93(3), 575 SE2d 444 (2003) (no appointed counsel after direct appeal (attempt to appeal ten years later and motion to vacate void judgment)]. If Defendant claims ineffective assistance, ***new*** counsel must be appointed without consideration of merits of claim [Garland, 283 Ga. 201, 657 SE2d 842 (2008)(not PD from same organization)].
   j. Right to recording and transcripts for indigents parallel right to counsel whether pro se or with appointed counsel [Coleman, 293 App. 251, 666 SE2d 620 (2008)].

2. Counsel must be appointed within a reasonable time after "attachment" to allow for adequate representation at any critical stage before trial, as well as at trial itself. [Rothgery v. Gillespie County, 554 U.S. 191 (2008)].
3. Initial appearance hearing is not a critical stage since "[n]othing at this stage...impairs the defense of the accused" [Simmons, 260 Ga. 92, 390 SE2d 43 (1990)].

CAUTION - Normally, appointment of counsel at arraignment for defendants out on bond would be sufficient, ***provided*** counsel was given adequate time to file motions after investigation of the case, and the trial was not set too soon . A ***blanket policy***, however, against appointment of counsel prior to arraignment even for defendants out on bond might lead to liability under 42 USC § 1983 [*see* Rothgery v. Gillespie County, 554 U.S. 191 (2008) (defendant charged with felony solely due to misunderstanding of his criminal record, no counsel appointed prior to indictment and re-arrest despite repeated requests)]. At first appearance hearing, where public defender system is available, Court may wish to tell defendants that if released on bond, they must contact public defender office for appointment if they wish representation prior to arraignment. If only appointed private counsel are available, Court may wish to at least consider unusual requests for appointment for such defendants rather than having a blanket policy of never appointing counsel.

4. Probation revocations have an unique standard for when there is a right to counsel (see **5.4F**).
5. Some non-judicial activities such as interrogation [Massiah v. United States, 377 U.S. 201 (1965); *accord*, Fellers v. United States, 540 U.S. 519 (2004) (includes any conversation which ***deliberately elicits information*** about the case)], and line-ups and other identification proceedings [United States v. Wade, 388 U.S. 218 (1967); Moore v. Illinois, 434 U.S. 220 (1977)] are critical stages of the prosecution; however, if prosecution has not yet been initiated, there is no right to counsel at such a critical stage [Kirby v. Illinois, 406 U.S. 682 (1977)].
6. After direct appeal - counsel only for trial and for the direct appeal of conviction and sentence [Rooney v. State, 287 Ga. 1, 690 SE2d 804 (2010) (motion to void sentence); Orr v. State, 276 Ga. 91, 93(3), 575 SE2d 444 (2003) (motion to void conviction; also 10 year late appeal)] .

C. Case specific - Sixth Amendment right to counsel is case specific - fact that defendant has requested or retained counsel in one case does not preclude State from requesting *Miranda* waiver in connection with another case [McNeil v. Wisconsin, 501 U.S. 171, 175 (1991); Smith, 273 App. 107, 614 SE2d 219 (2005)] unless one offense is a lesser included offense of the other [Texas v. Cobb, 532 U. S. 162 (2001); Chenoweth, 281 Ga. 7, 635 SE2d 730 (2006)].

D. Collateral consequences of pleas - Sixth Amendment Right to Counsel may include advice on collateral consequences of plea [Padilla v.Kentucky, 130 S. Ct. 1473; 176 L. Ed. 2d 284 (2010)]:
   1. Affirmative misrepresentations about those consequences in response to his client's specific inquiries may constitute ineffective representation [State v. Patel, 280 Ga. 181, 626 SE2d 121 (2006) (medical license); Smith v. Williams, 277 Ga. 778-779(1), 596 SE2d 112 (2004) (parole eligibility); Rollins v. State, 277 Ga. 488, 489-490(1), 591 SE2d 796 (2004) (bar admission and *immigration consequences*)]
      - In order to set aside conviction, defendant must show a *reasonable probability* that bad advice led to plea instead of trial [State v. Sabillon, 280 Ga. 1, 622 SE2d 846 (2005)].
   2. *Immigration consequences* of plea:
      a. Bad advice concerning immigration consequences may result in grounds to set aside plea [Padilla v.Kentucky, 130 S. Ct. 1473; 176 L. Ed. 2d 284 (2010) (including Alito concurrence); Rollins v. State, 277 Ga. 488, 489-490(1), 591 SE2d 796 (2004)];
      b. Failure to advise concerning immigration consequences of plea is ineffective assistance where the law is succinct and straightforward [Padilla];
      c. Failure to advise non-citizen that there may be immigration consequences and s/he may need to seek advice from an immigration attorney may be ineffective assistance [Padilla (including Alito concurrence)];
      d. ***Court** also* has affirmative duty to determine that non-citizen understands that a guilty plea may affect immigration status [OCGA 17-7-93] (see **NOTE on immigration consequences** at **5.4C**(4)(d)).
   3. Although many cases in Georgia state that there is no affirmative duty to advise defendants on other collateral consequences of plea in the absence of misinformation (see Patel, Williams, Rollins), in Padilla, the U.S. Supreme Court pointedly noted that it has never adopted such a general rule. Other courts have ruled that inquiry from defendant may trigger duty to provide correct advice in certain circumstances.

E. Defendant's choice of counsel - "the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds" [United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (refused admission of attorney pro hac vice due to misinterpretation of ethical rule)]. Where this right is denied, reversal is automatic without harmless error analysis. Defendant's choice of counsel *may be denied* when:
   1. Counsel is appointed for indigent;
   2. Counsel has conflict of interest (even if waived by client);

3. Trial court has an independent interest in insuring that:
   a. Criminal trials are conducted within the ethical standards of the profession, and
   b. Legal proceedings appear fair to all who observe them;
4. Defendant's choice must also be weighed against:
   a. the needs of fairness [*see* Lynd, 262 Ga. 58, 62 (9)(a), 414 SE2d 5 (1992) (trial court acts may require a defendant to accept appointment of an attorney or retain a more experienced attorney when the court is concerned about the inexperience of the defendant's retained attorney)];
   b. the demands of the trial court's calendar [*accord*, Cole, 284 App. 246, 643 SE2d 733 (2007)].

F. Effect of denial of counsel - Failure to protect right to counsel *at particular stage of proceeding* causes reversal of later conviction unless appellate court finds error harmless beyond a reasonable doubt [Lowery, 282 Ga. 68, 646 SE2d 67 (2007); Hightower, 236 Ga. 58, 222 SE2d 333 (1976); Tarpkin, 236 Ga. 67, 222 SE2d 364 (1976); Bache, 208 App. 591, 431 SE2d 412 (1993); Humphries, 255 App. 349, 565 SE2d 558 (2002)], but some issues require ***automatic reversal***:
   1. Actual or constructive denial of counsel, including improper denial of choice of *non-appointed* counsel [United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (***structural error*** of refusing defendant counsel of choice requires automatic reversal)]);
   2. Counsel that labors under an actual conflict of interest that adversely affects performance [Strickland v. Washington, 466 U. S. 668 (1984); Heath, 277 Ga. 337, 338, 588 SE2d 738 (2003); Cole, 284 App. 246, 643 SE2d 733 (2007)]; **or**
   3. Other "structural" interference with defense counsel - interfering in certain ways with the ability of counsel to make independent decisions about how to conduct the defense [Strickland, 466 U. S. at 686 (1984) (examples include requiring calling defendant as first defense witness, barring client conference during overnight recess, disallowing summation in bench trial); *accord*, United States v. Gonzalez-Lopez].

G. Inherent power to assist effectual representation - Court had authority to order sheriff to bring defendants to courthouse to facilitate pre-arraignment consultation [Brown v. Incarcerated Public Defender Clients, 288 Ga.App. 859, 655 SE2d 704 (2007) (order to "persons connected with a judicial proceeding before [court]"].

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H. Withdrawal of counsel - Court may deny withdrawal of counsel only based upon a finding under Uniform Superior Court Rule 4.3:
   1. Delay of trial;
   2. Other interruption the orderly operation of the court;
   3. Manifest unfairness to the client [Odum, 283 App. 291, 641 SE2d 279 (2007) (client's suit against PD required granting withdrawal (no delay))].

Where withdrawal of the attorney will delay the proceeding, conflict between conflict and disagreements over trial strategy do not necessarily entitle defendant to new appointed counsel [Johnson, 283 App. 524, 642 SE2d 170 (2007) (day of trial); Bryson, 282 App. 36, 638 SE2d 181 (2006)(4 days before trial)]. Where defendant hires new counsel, Court may deny withdrawal of old counsel and require both to represent where trial is imminent [Cole, 284 App. 246, 643 SE2d 733 (2007) (5 days before trial); *accord*, Billings v. State, 308 Ga.App. 248, 707 SE2d 177 (2011) (denied withdrawal motion during trial (after continuance denied) and required counsel to proceed)].

5. 2 Appointed counsel - The Sixth Amendment right to counsel includes a right to have counsel appointed at government expense when the defendant cannot afford counsel whenever Defendant faces the possibility of incarceration on the charges, even where that incarceration would only take place through violation of probation or failure to meet the conditions of suspending the sentence [Alabama v. Shelton, 535 U.S. 634 (2002); Barnes, 275 Ga. 499, 570 SE2d 277 (2002)]. For stages of proceedings covered, see **5.1**B.

A. Judge cannot delegate the determination - Trial judge must **personally** determine that defendant is not eligible for appointed counsel and further has not exercised reasonable diligence in obtaining one before forcing defendant to trial without lawyer - cannot rely on public defender's determination [Raines, 242 App. 727, 531 SE2d 158 (2000); Houston, 205 App. 703, 423 SE2d 431 (1992); Martin, 240 App. 246, 523 SE2d 84 (1999); see Uniform Rules for the Superior Court § 29.4, 29.5].

B. Trial Court determination of indigency - When the trial court follows the correct procedure and considers the appropriate factors, its determination of indigency is not subject to review [McQueen, 240 App. 15, 522 SE2d 512 (1999); Lopez, 259 App. 720, 578 SE2d 304 (2003)]; however, the court must still inquire into waiver and must either postpone trial or appoint counsel if non-indigent defendant has not waived the right to counsel through neglect [Nunnally, 261 App. 198, 582 SE2d 173 (2003) (initial counsel withdrew and defendant was put on trial two months later)].

- Affidavit of indigency rebuts presumption that retained counsel will continue to represent defendant (e.g., post-trial) and requires trial court inquiry [Massey, 278 App. 303, 628 SE2d 706 (2006)].

C. "Almost indigent" - although there is no right to ***appointed*** counsel except for indigent defendants, where the defendant has made a diligent effort to obtain counsel the court must make an individualized decision as to whether the appointment of counsel is appropriate. The court may not refuse all such requests as a matter of policy [Flanagan, 218 App. 598, 462 SE2d 469 (1995); Flanagan, 224 App. 272, 480 SE2d 299 (1997); Martin, 240 App. 246, 523 SE2d 84 (1999); *see* Uniform Rules for the Superior Court § 29.5: "the court may appoint counsel for representation for any accused person who is unable to obtain counsel due to special circumstances such as emergency, hardship, or ***documented refusal*** of the case by members of the private bar because of financial inability to pay for counsel;" *but see* OCGA 17-12-2].

1. This determination must be based upon time constraints imposed upon defendant to proceed to trial;
2. Assessment of the costs of counsel against defendant [OCGA 17-12-51, 17-10-8.1 ($50 application fee); Uniform Rules for the Superior Court § 29.5]:
   a. Provision may be used in courts other than superior court [Burns, 251 App. 889, 555 SE2d 209 (2001)];
   b. Assessment can be made a part of a criminal sentence and terms of probation after conviction or guilty plea [Burns, 251 App. 889, 555 SE2d 209 (2001); OCGA 17-12-51; Pless, 282 Ga. 58, 646 SE2d 202 (2007)];
   c. Cash contribution by Defendant can be made a condition of continued representation [Uniform Rules for the Superior Court § 29.5; *cf.* Pless, 282 Ga. 58, 646 SE2d 202 (2007)];
   d. Such assessment is particularly appropriate when Defendant does not meet normal indigency standards and would have the resources to pay for counsel with considerable additional time [see Flanagan];
   e. Court must conduct inquiry into ability to pay even if imposing community service in lieu of reimbursement [Reid, 224 App. 524, 481 SE2d 259 (1997); see Burns];

f. Court may conduct hearing or, if sufficient financial information is available through affidavits submitted in applying for appointed counsel, may make a finding on the record based on the previously submitted information [Miller, 221 App. 718, 472 SE2d 697 (1996)];
g. Any such payment should be paid directly to the fund for indigent defense of the affected county [Uniform Rules for the Superior Court § 29.5].

D. Defendant has no right to refuse a particular appointed counsel or insist on change [Johnson, 260 App. 413, 579 SE2d 809(2003) (request for continuance to obtain new counsel directed to trial court's discretion and need not be granted when defendant has had several months); Middlebrooks, 255 App. 541, 566 SE2d 350 (2002) (request to change is in discretion of court - distrust or loss of confidence by defendant in appointed counsel does not entitle one to new counsel or show that counsel could not provide him with effective representation); Cobble, 199 App. 29, 404 SE2d 134 (1991)].

E. Appointed private counsel - Court has authority to appoint private counsel to represent defendant (against wishes of attorney) even where county has public defender program [In re Echols, 222 App. 611, 475 SE2d 658 (1996)].

5. 3 Waiver of Right to Counsel and Right of Self-Representation

A. Defendant has a Constitutional Right to Represent him/herself [Faretta v. California [422 U.S. 806 (1975)].

1. Before allowing self-representation, the Court must determine that the Defendant has made a knowing, intelligent and voluntary waiver of the right to counsel.
   - Severely mentally ill defendant who is competent to stand trial does not necessarily have the right to represent self [Indiana v. Edwards, 554 U.S. 164 (2008)].
2. Defendant must ***choose*** between having a lawyer and self representation:
   a. No right to represent self and *also* have attorney [Loden, 199 App. 683, 406 SE2d 103 (1991)];
   b. However, if the defendant is an attorney, he or she may both represent self and have counsel [Miller, 219 App. 213, 464 SE2d 621 (1995)].
   c. A pleading filed pro se by a party who is represented by counsel is a nullity [Pless, 255 App. 95, 564 SE2d 508 (2002)];
   d. A Defendant competent to stand trial is competent to choose to represent self [Lamar, 278 Ga. 150, 598 SE2d 488 (2004)];
   e. Request for self-representation ***after*** the commencement of the trial does not have to be honored [Stewart, 267 App. 100, 598 SE2d 837 (2004); Thomas v. State, 300 Ga.App. 265, 684 SE2d 391 (2009)];

f. When Defendant keeps changing mind, Court has discretion to keep counsel in case [Joyner, 278 App. 60, 628 SE2d 186 (2006)].

NOTE - Strategic decisions largely remain in the hands of the defendant even when represented: "the attorney 'is still only an *assistant* to the defendant and not the master of the defense'"[Rivera, 282 Ga. 355, 647 SE2d 70 (2007)]. This includes the decision on whether to testify [Feaster, 283 App. 417, 641 SE2d 635 (2007)]; it is better practice to review defendant's decision on the record [Paige, 277 App. 687, 627 SE2d 370 (2006)].

B. Court must provide sufficient information to Defendant to be satisfied that Defendant understands the ***general*** consequences of proceeding without counsel and that the waiver is knowing and intelligent [Iowa v. Tovar, 541 U.S. 77 (2004)].

C. A knowing and intelligent waiver of counsel is required from both indigent defendants and those who can afford private counsel. Even in cases where only a fine will be imposed, defendant has right to hire an attorney and the ***record*** (written record may still be adequate where no incarceration) must be shown that defendant ***knowingly and intelligently waived*** this right before entering a plea or being forced to trial without counsel [Barnes, 275 Ga. 499, 570 SE2d 277 (2002) ("[t]he right to private counsel … in all criminal prosecutions - not merely those resulting in imprisonment or a fine …. Whether that right to counsel has been waived is an independent and separate inquiry from whether the right to court-appointed counsel exists"); Godlewski, 256 App. 35, 567 SE2d 704 (2002); Deren, 237 App. 387, 515 SE2d 191 (1999); see Goger, Daniel's Georgia Criminal Trial Practice, §7-3; *but see* Jackson, 257 App. 715, 572 SE2d 60 (2002) (no waiver required where fine only imposed); Miller-Roy, 255 App. 575, 565 SE2d 899 (2002) (the same procedure and trial judge on the same arraignment calendar as Godlewski)]. This would necessarily imply that defendant would have to be afforded some time to hire counsel if desired after being informed of his right.

- Informing Defendant of the right to counsel at a jury trial and signing a generalized plea form is inadequate for waiver of the right to counsel in pleading guilty; Defendant must also be advised of the right to counsel in entering a plea [Fulwood v. State, 290 Ga. 335, 720 SE2d 642 (2012)].

D. ***Amount and type of information to be provided to Defendant varies with the stage of the proceeding*** [Parks v. McClung, 271 Ga. 795, 525 SE2d 362 (1999), overruled on other grounds Barnes, 275 Ga. 499, 570 SE2d 277 (2002)); see Thompson, 256 App. 776, 569 SE2d 884 (2002)]. The information a defendant must possess in order to make an intelligent election depends on the facts of the case, including the defendant's education or sophistication, the complex or easily-grasped nature of the charge, and the stage of the proceeding - pretrial proceedings, including guilty pleas, do not require the same warnings as would

be given to a defendant seeking to waive counsel at a trial [Iowa v. Tovar, 539 U.S. 987 (2004)].

NOTE - A unanimous U.S. Supreme Court authority makes clear that the nature and extent of advisement of rights depends upon all the facts and circumstances of the case, including the seriousness and complexity of the charges [Iowa v. Tovar, 541 U.S. 77 (2004); *see* Watson, 244 App. 484, 536 SE2d 170 (2000) ("*Given the nature of the charges against him*, Watson was entitled to be represented by counsel at his preliminary hearing."); Washington v. City of Atlanta, 201 App. 876, 412 SE2d 624 (1991) ("investigate these circumstances personally with *particular* regard and attention to the nature of the crimes charged and the possible penalties....")]. Indeed, in considering whether a defendant pleading guilty must be advised that proceeding without counsel "entails the risk that a viable defense will be overlooked" and deprives one of the opportunity to obtain an independent opinion as to whether it is wise to plead guilty, the Supreme Court cited with approval the observation that in a case as "straightforward" as a DUI such admonitions:

> "might confuse or mislead a defendant more than they would inform him, i.e., the warnings might be misconstrued to convey that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one. If a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded, and the resources of the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted."

Minimum standards for the waiver of counsel, however, will apply regardless of the seriousness of offense, including even ordinance violation cases [*see* Brownlee v. City of Atlanta, 212 App. 174, 441 SE2d 492 (1994) (failure to establish factual basis of plea in ordinance violation case); Washington v. City of Atlanta].

E. General Requirements

1. Court must inquire into waiver of counsel (***without the Defendant raising the issue***), once the Sixth Amendment has attached through initiation of the prosecution [Fortson, 272 Ga. 457, 458, 532 SE2d 102 (2000) (in context with Defendant's request to withdraw plea, Court was required to inquire into waiver of counsel on its own); see Babb, 252 App. 518; 556 SE2d 562 (2001)]. Kennedy, 267 App. 314, 599 SE2d 290 (2004)].
2. If a waiver is later challenged, State has burden of establishing that waiver was proper
   a. ***Verbatim*** record (electronic or by court reporter) is required of any plea [Uniform Rules for the State Court § 33.11], particularly where incarceration is imposed [King, 270 Ga. 367, 509 SE2d 32 (1998) (reinterpreting rule - showing that the court satisfied itself that the plea of guilty and particularly any waiver of right to counsel was free, voluntary, and intelligently waived)];

b. If the Defendant does not adequately understand English, Court must either provide a certified translator or an electronic record must be made of both the foreign language and English [Supreme Court Rule on Use of Interpreters for Non-English Speaking Persons, VII (Appendix **B2**)];
c. This requirement of a ***verbatim*** record may also apply in other waiver of counsel situations [see Watson, 244 App. 484, 536 SE2d 170 (2000) (preliminary hearing - waiver of the right to counsel at the commitment hearing cannot be presumed from a silent record or from testimony about general practice); Tucci, 255 App. 474, 565 SE2d 831 (2002) (counseling Defendant of dangers of proceeding to trial without counsel and waiver of right to have case reported)];
d. Written waiver forms will not be sufficient by themselves without a ***personal*** inquiry from the Court, but they can be a useful part of the record [*Compare* Clower v. Sikes, 272 Ga. 463, 532 SE2d 98 (2000) *with* Tucci, 255 App. 474, 565 SE2d 831 (2002) (includes list of essential factors in waiver of counsel form, which may be useful, but probably not alone sufficient to establish waiver of counsel)*; but see* Cooper, 281 Ga. 63, 636 SE2d 493 (2006) (waiver form filled *Boykin* gaps [see **NOTE** at **5.4**C3] with ***represented*** defendant); Annaswamy, 284 App. 6, 642 SE2d 917 (2007) (relied on form - judge need not address all points of intelligent waiver personally); David, 631 App. 714, 631 SE2d 714 (2006); Dellinger, 269 App. 878, 605 SE2d 632 (2004) (approving a waiver *almost* entirely based on written form in ***minor traffic*** case); *see also* Watkins, 291 App. 343, 662 SE2d 544 (2008) (written waiver at arraignment insufficient to find waiver at trial when defendant changed mind but conditions otherwise hadn't changed)].

   Waiver forms should inform of:
   - the possibility of a jail sentence;
   - the rules of evidence will be enforced;
   - strategic decisions with regard to voir dire and the striking of jurors must be made by defendant;
   - strategic decisions as to the calling of witnesses and/or the right to testify must be made by defendant; and
   - issues must be properly preserved and transcribed in order to raise them on appeal.

F. Waiver may also occur where a properly advised Defendant has not exercised reasonable diligence in obtaining an attorney [Lopez, 259 App. 720, 578 SE2d 304 (2003) (repeated delay and misinforming court about whether counsel was retained); Young, 245 App. 799, 538 SE2d 487 (2000); Martin, 240 App. 246, 523 SE2d 84 (1999); McQueen, 240 App. 15, 522 SE2d 512 (1999); Houston, 205 App. 703, 423 SE2d 431 (1992); *see* Hatcher v. State, 320 Ga.App. 366, 739 SE2d 805 (2013) (at arraignment 2 months before trial and 18 days before jury selection defendant stated was employed and would be hiring counsel and turned down opportunity to apply for public defender and received minimal cautioning on dangers of self-representation – no error in finding lack of diligence)].

1. Burden of proof is on the Defendant to show due diligence in seeking counsel [Collins, 269 App. 164, 165, 603 SE2d 523, 525 (2004); Tinker, 218 App. 792, 794 (1)(b), 463 SE2d 368 (1995)].
2. Firing counsel 10 days before trial justifies a finding of waiver [Collins, 269 App. 164, 165, 603 SE2d 523, 525 (2004)].
3. Firing counsel in midst of trial may also be a waiver if Defendant understands he will proceed without counsel [Simmons v. State, 309 Ga.App. 369, 710 SE2d 193 (2011) (can't use discharge of attorney as dilatory tactic to continue case); Keller, 286 App. 292, 648 SE2d 714 (2007) (counsel declined to present witness due to ethical concerns and court appointed different attorney as "stand-by counsel"); *but see* Davis, 279 App. 628, 631 SE2d 815 (2006) (Defendant fired attorney for not objecting to shackles and handcuffs and after attorney did not ask voir dire questions - wanted new counsel - Appellate court unpersuaded he intelligently waived counsel)].

Caution - ***If the Court has not*** established a record that it ***personally warned*** the defendant ***of the dangers*** of proceeding to trial without counsel there can be no lack of diligence by defendant in failing to obtain counsel or request appointed counsel, and therefore no waiver of right to counsel by conduct [Watkins, 291 App. 343, 662 SE2d 544 (2008) (Defendant in misdemeanor case signed written waiver and passed up opportunity to timely request appointed counsel, but ***requested counsel on day of trial***]. Even a request for appointed counsel on the day set for trial must be considered and the diligence of the Defendant evaluated - a general ability to pay and failure to appear with counsel is not necessarily enough to find a waiver of the right to counsel [Flanagan, 218 App. 598, 462 SE2d 469 (1995); Flanagan, 224 App. 272, 480 SE2d 299 (1997); Ford, 254 App. 413; 563 SE2d 170 (2002)(last-minute appointment of "stand-by counsel" not enough); Nunnally, 261 App. 198, 582 SE2d 173 (2003); *cf.* Davis, 279 App. 628, 631 SE2d 815 (2006) (in trial); *but see* Hatcher v. State, 320 Ga.App. 366, 739 SE2d 805 (2013) (at arraignment 2 months before trial and 18 days before jury selection defendant stated was employed and would be hiring counsel and turned down opportunity to apply for public defender and received minimal cautioning on dangers of self-representation – no error in finding lack of diligence; also stated "the court was not required to give Hatcher a warning of the dangers of proceeding pro se [fn] because such requirement applies 'only in the context of a waiver of the right to counsel by election of the countervailing right of self-representation. [Cit.]'")]. Once a proper inquiry is made the Court's decision will be reviewed under an abuse of discretion standard [Collins, 269 App. 164, 165, 603 SE2d 523, 525 (2004); McQueen, 240 App. 15, 522 SE2d 512 (1999)].

Recommendation - When Defendant requests counsel at arraignment, does not meet a general guideline standard of indigency, but wishes to proceed to trial, advise him or her "to make arrangements for retained counsel or to begin keeping written records regarding their income, expenses, and unsuccessful attempts to retain counsel if they wished to be considered for appointed counsel" [Young, 245 App. 799, 538 SE2d 487 (2000)].

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5. 4 Advisement of Rights at Particular Stages of the Prosecution

A. Pre-Arrest Probable Cause Hearings [OCGA 17-4-40(b)]. Whether or not Defendant has the right to appointed counsel, he or she would be entitled to appear through a privately retained attorney (see URMC § 25.3B).

B. Preliminary Hearings:
Georgia Supreme Court approved the following as sufficient advisement [Camphor, 272 Ga. 408, 410 (2a), 529 SE2d 121 (2000)]:
- the right to counsel, including appointed counsel if indigent,
- the nature of the commitment hearing proceedings,
- the dangers of testifying if without advice of counsel (most important in the commitment hearing context - it may be appropriate to note that it is not customary to testify at this stage).

Additionally, does the Court find a waiver of the right to counsel by failure to obtain one after the initial continuance of the case from the first appearance hearing? If so, that the Defendant has the option of waiving the hearing or proceeding pro se.

NOTE - The Court of Appeals has applied a more stringent standard than Camphor in several cases requiring an advisement akin to that for defendants proceeding to trial including 6 ***additional*** elements based upon case law for waiver of counsel at trial [Watson, 244 App. 484, 536 SE2d 170 (2000)]: apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, all other facts essential to a broad understanding of the matter, and a record, such as a recording, must be made of the waiver (waiver of the right to counsel at the commitment hearing cannot be presumed from a silent record or from testimony about general practice).

Cases such as Watson following this requirement (except as to the record) are inconsistent with Camphor, Jones, 272 Ga. 884, 536 SE2d 511 (2000) and again recently Evans, 285 Ga. 67, 673 SE2d 243, (2009) (reversing attempt to require six elements for waiver of counsel at trial).

CAUTION - Most reversals come when unrepresented defendants testify, and the testimony is used at trial, so a specific advisement about the dangers of testifying without the advice of counsel may be prudent.

C. Guilty Pleas

1. "It is difficult to imagine a mass arraignment procedure which could satisfy the trial court's burden;" the court needs to "investigate these circumstances ***personally*** with ***particular*** regard and attention to the nature of the crimes charged and the possible penalties...." [Washington v. City of Atlanta, 201 App. 876, 412 SE2d 624 (1991)].
2. ***Written waiver*** may help establish that the Defendant is making a knowing and intelligent record [See Obi, 230 App. 476, 496 SE2d 556 (1998) and Deren, 237 App. 387, 515 SE2d 191 (1999)]; Stephens, 235 App. 758, 510 SE2d 575 (1998); Moore, 225 App. 860, 485 SE2d 552 (1997)], but a written waiver alone is insufficient, the defendant must be ***questioned*** in the ***presence of the judge***, especially about the right to counsel, the voluntariness of the plea, and the right to a jury trial [Clower v. Sikes, 272 Ga. 463, 532 SE2d 98 (2000); Whitaker, 244 App. 241, 243, 535 SE2d 283 (2000) (defendant must personally and intelligently participate in waiver of right to trial by jury); accord, Pirkle, 221 App. 657, 472 SE2d 478 (1996), citing Patton v. United States, 281 U.S. 276 (1930); see Johanson, 260 App. 181, 581 SE2d 564 (2003); Uniform Superior Court Rule § 33.7 (voluntariness); Cooper, 281 Ga. 63, 636 SE2d 493 (2006) (waiver form filled *Boykin* gaps [see **NOTE** below] with ***represented*** defendant); David, 631 App. 714, 631 SE2d 714 (2006); Jackson, 257 App. 715 (4), 572 SE2d 60 (2002) (written waiver of jury trial in case where only fine imposed was OK); Odum, 255 App. 70, 564 SE2d 490 (2002) (same)].
   - Questioning about rights may be by prosecutor in presence of judge [State v. Germany, 245 Ga. 326, 328-329, 265 SE2d 13 (1980); Ransom v. State, 293 Ga.App. 651, 667 SE2d 686 (2008)].
3. Defendant should be informed on the record that by entering a plea of guilty or nolo contendere one waives:
   a. The right to trial by jury;
   b. The presumption of innocence;
   c. The right to confront witnesses against oneself;
   d. The right to subpoena witnesses;
   e. The right to testify and to offer other evidence;
   f. The right to assistance of counsel during trial (as well as the right to counsel during the plea [Fulwood v. State, 290 Ga. 335, 720 SE2d 642 (2012)]);
   g. The right not to incriminate oneself [Uniform Superior Court Rule 33.8].

BOYKIN rights - Items a, c, & g are the ***constitutional*** rights whose omission, along waiver of counsel, where applicable, result in automatic reversal [Boykin v. Alabama, 395 U.S. 298 (1969); Beckworth, 281 Ga. 41, 635 SE2d 769 (2006); *see* Fulwood v. State, 290 Ga. 335, 720 SE2d 642 (2012) (include right to counsel ***during plea***)].

4. Defendant should also be informed:
   a. That by pleading not guilty or remaining silent and not entering a plea, one obtains a jury trial;
   b. Of the maximum possible sentence on the charge, including that possible from consecutive sentences and enhanced sentences where provided by law; and/or,
   c. Of the mandatory minimum sentence, if any, on the charge. This information may be developed by questions from the judge, the district attorney or the defense attorney or a combination of any of these [Uniform Superior Court Rule 30.8(C)(4); the maximum and minimum sentence requirements are specifically reiterated in Iowa v. Tovar, 541 U.S. 77 (2004)];
   d. If the defendant is not a citizen of the United States, that a plea of guilty may have an impact on his or her immigration status [OCGA 17-7-93].

NOTE on collateral (including immigration) consequences - Court need only advise of direct consequences of plea - within the direct sentencing authority of court [Smith v. State, 287 Ga. 391, 697 SE2d 177 (2010)]; except, noncitizens should be generally advised that there could be immigration consequences of a plea. ***Misinformation*** about collateral consequences may justify setting aside a plea [Stinson, 286 Ga. 499, 500, 689 SE2d 323 (2010); Sabillon, 280 Ga. 1, 2, 622 SE2d 846 (2005)]. Where defendant has counsel, counsel must both inform the defendant generally about possible immigration consequences and also inform of deportation consequence for an offense where the law is "succinct and straightforward." [Padilla v. Kentucky, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)]. To set aside a plea based on failure to inform of immigration consequences,
Defendant must show "manifest injustice," and at a minimum:
(1) that he is not a citizen;
(2) that the facts, viewed in conjunction with the immigration laws, show some real risk to his immigration status;
(3) that no one ever advised him of those risks; and
(4) that if he had known of the risks, he would have refused to plead guilty and taken his chances at trial. Overstating maximum sentence faced by the defendant does not discourage requesting counsel [Walke v. Stater, 288 Ga. 174, 702 SE2d 415 (2010)].

5. The Court should also determine the terms of any negotiated plea and allow the Defendant to withdraw guilty plea if negotiated plea is not accepted [Germany, 246 Ga. 455, 271 SE2d 851 (1980)].

6. Defendant must understand the charges against him:
   a. The Court should make sure the Defendant has read a copy of the charges;
   b. If the Defendant is pleading guilty to a crime for which there is no accusation, citation or indictment drawn, the Court must review the elements of the alternate charges to which the Defendant is pleading guilty [Breland v. Smith, 247 Ga. 690, 691, 279 SE2d 204 (1981)].
   c. If it is not clear from the accusation that intent is an element of the crime charged, it may be advisable to make sure the Defendant understands this or is acknowledging intentional misconduct [see Breland v. Smith, 247 Ga. 690, 691, 279 SE2d 204 (1981)].
7. There must be a factual basis for the plea:
   a. Purpose is "to protect against someone pleading guilty when that person may know what he has done but may not know that those acts do not constitute the crime with which he is charged [King v. Hawkins, 266 Ga. 655, 469 SE2d 30 (1996)];
   b. Purpose is not to establish that proof would be available to show guilt beyond a reasonable doubt [King];
   c. Preferred method is a oral showing on the record which the Defendant hears or acknowledges [Uniform Superior Court Rule 33.9] - this enables all to proceed with sentencing on a known record of what the conduct at issue is. However, the Court may wish to make affidavits or police reports part of the record since such matters will be considered in determining whether anything missing in the record is harmful [Evans, 265 Ga. 332, 454 SE2d 468 (1995)].

NOTE on setting aside pleas - Prior to oral pronouncement of sentence, defendant has a right to withdraw a plea [State v. Germany, 246 Ga. 455, 456, 271 SE2d 851 (1980)]. Further, if the Court rejects the terms of a negotiated plea, defendant has right to withdraw plea [Uniform Superior Court Rule 33.10].

After sentence is pronounced, Court has a broad power to set aside plea ***within the same term of court*** - after the term has expired, the procedure for defendant to set aside plea is through habeas corpus [Powell v. State, 297 Ga.App. 833, 678 SE2d 524 (2009)]. No particular form is required for pro se defendant to seek to set aside a sentence, and it can be error to fail to treat a letter from defendant within same term as a motion to set aside plea [McKiernan v. State, 286 Ga. 756, 692 SE2d 340 (2010)].

Caution - Pinkerton, 262 Ga.App. 858, 586 SE2d 743 (2003) appears at first reading to blur the line between the different types of rights required at different stages of the proceeding [see **5.3**D], but such a reading of Pinkerton is entirely at odds with the recent U.S. Supreme Court decision of Iowa v. Tovar, 541 U.S. 77 (2004)]. In Pinkerton, a defendant ***at arraignment*** talked to the prosecutor in an attempt to obtain a dismissal of the charges and made vital incriminatory statements. (The defendant elected to proceed to trial, the trial court wisely suppressed the statements, and the State unsuccessfully appealed before trial). With little discussion, the Court of Appeals applied two cases concerning the rights required to be given Defendants ***proceeding to trial***: Middleton, 254 App. 648, 563 SE2d 543 (2002); McAdams, 258 App. 250, 252(1), 573 SE2d 501 (2002). Because of the lack of analysis, it is difficult to discern the significance of Pinkerton - arguably it signified a new determination that the advisements required before trial are required at every stage of the proceedings. But only the day before Pinkerton, the Court of Appeals upheld an uncounseled guilty plea under ordinary analysis covering only the points mentioned in **5.4**C, above and none of the trial principles covered in **5.4**D, below [Hirjee, 263 App. 185, 587 SE2d 144 (2003); see transcript at **5.6**]. More importantly, such a reading of Pinkerton is inconsistent with Tovar, where the U.S. Supreme Court made clear that pretrial proceedings did not require the specificity of warnings called for at trial. Alternatively, the case could be reconciled based upon the fact that the defendant ***did proceed to trial*** but these unadvised statements destroyed his position, including his right not to testify, prior to a knowing waiver of his trial rights; in contrast statements by counsel about the facts during plea discussions could never be admitted against the defendant.

Recommendation - Defendants proceeding to trial should not be considered bound by their choices made prior to either retaining counsel or a knowing and intelligent waiver of their *Faretta* rights. Thus, statements prior to such a waiver would be suppressed, untimely motions permitted, etc. Alternatively, the trial judge would individually advise each defendant at arraignment of both the rights for one pleading guilty [see **5.4**C] and those for one proceeding to trial [see **5.4**D]).

D. Trial (Faretta Rights)- in addition to the information above that a Defendant needs to have to waive counsel when pleading guilty, the Court has additional responsibilities when Defendant chooses to proceed to trial without counsel:

1. Requirement for record - Although it will be the Defendant's requirement to establish a record of what transpired at trial (see 4 below), it is the State's responsibility to show by the record that the Defendant made a knowing, voluntary right [Dempsey, 267 App. 661, 600 SE2d 735 (2004); Bounds, 264 App. 584, 591 SE2d 472 (2003); *see* Nunnally, 261 App. 198, 582 SE2d 173 (2003)].

RECOMMENDATION - record the questioning of the Defendant about his waiver and the Court's finding and all other colloquies about obtaining counsel; a knowing and voluntary waiver is unlikely to be found in the absence of a ***verbatim*** record of all proceedings necessary to the finding.

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2. An appropriate written waiver form is useful, but is not alone sufficient to establish waiver of counsel by itself [Compare Tucci, 255 App. 474, 565 SE2d 831 (2002) (includes list of essential factors in waiver of counsel form) and Deren, 237 App. 387, 515 SE2d 191 (1999) with Clower v. Sikes, 272 Ga. 463, 532 SE2d 98 (2000)); *but see* Lawal, 264 App. 49, 589 SE2d 861 (2003) (suggests form enough)]. Such a form should address the issues relevant to a Defendant representing self ***at trial***.
3. **Key to effective waiver** - defendant "was made aware of the ***dangers*** of self-representation and nevertheless made a knowing and intelligent waiver." [Evans, 285 Ga. 67, 673 SE2d 243, (2009); Faretta v. California, 422 U.S. 806 (1975)].
    - Court of Appeals, until recently, had seemed to require that the waiver be made ***after*** an explanation of the nature of the charges, including lesser included offenses, possible defenses, mitigating circumstances and all other facts essential to a broad understanding of the matter [Prater, 220 App. 506, 469 SE2d 780 (1996); Tucci, 255 App. 474, 565 SE2d 831 (2002)]; but the Supreme Court has consistently resisted attempts to require this [Evans, 285 Ga. 67, 673 SE2d 243, (2009); Jones, 272 Ga. 884; 536 SE2d 511 (2000); Wayne, 269 Ga. 36, 495 SE2d 34 (1998)]. Some case law describes such advisement as useful or preferable, but in Evans the Supreme Court said: "Indeed, the defendant's 'technical legal knowledge' is irrelevant to the question of whether he validly waives his right to be represented by counsel. [Cit.] 'The test is not whether the accused is capable of good lawyering -- but whether he knowingly and intelligently waives his right to counsel.'"

Note - Because the key to an effective waiver is an advisement of the dangers to self-representation, the most difficult advisement may be if the court does not view the choice as ill-advised (e.g., a speeding case where only a fine is likely to be imposed).

4. "A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course" [McKaskle v.Wiggins, 465 U.S. 168, 183-184 (1984); see Winston, 270 App. 664, 607 SE2d 147 (2004); cf. Evans, 285 Ga. 67, 673 SE2d 243, (2009)].
5. Court must also advise the defendant on the need to have the case taken down by a court reporter in order to have a record for appeal [Hamilton, 233 App. 463, 504 SE2d 236 (1998); Tucci, 255 App. 474, 565 SE2d 831 (2002)].
6. Appointment of "stand-by counsel" may save borderline waiver of counsel [Granville, 281 App. 465, 636 SE2d 173 (2006)], but is not always sufficient [Middleton, 254 App. 648, 650, 563 SE2d 543 (2002); Ford, 254 App. 413; 563 SE2d 170 (2002) (last-minute appointment of "stand-by counsel" not enough)].

E. Appeal - If defendant is not advised of time limit of appeal and right to appointed counsel on appeal (if indigent), then out-of-time appeal must be allowed [Hill, 285 App. 310, 645 SE2d 758 (2007) (allowed appeal ***if*** indigent)].

F. Probation revocation - The right to appointed counsel is somewhat more limited than in original prosecutions. Presumptively, a defendant is entitled to counsel based on a colorable claim that:

- he or she did not commit the alleged violations of conditions ***or***
- there are substantial reasons which justify or mitigate the violation ***and*** the reasons are complex or otherwise difficult to develop or present

Court should consider whether probationer appears to be capable of speaking effectively. If counsel is refused the grounds for refusal must be stated for the record [Gagnon v. Scarpelli, 411 U.S. 778 (1973); Vaughn v. Rutledge, 265 Ga. 773, 462 SE2d 132 1995]. Due to the limited right to counsel, consent orders, and presumably also adjudications and admissions, may be utilized in subsequent proceedings without showing an effective waiver of counsel [Wolcott, 278 Ga. 664, 607 SE2d 147 (2004)].

G. Contempt

1. ***Indirect criminal contempt*** - hearing to determine if person committed indirect criminal contempt should be treated as a non-jury criminal trial, at least if the person faces possible incarceration [Merritt, 261 App. 597, 583 SE2d 283 (2003) (non-party (juror))] - therefore, defendant should be advised of right to attorney, danger of self-representation, right to have proceedings recorded, right to appointed counsel, if indigent, etc. [see **5.4**D]; contempt action on bond for good behavior would be a classic example of indirect criminal contempt;
2. Direct criminal contempt - when direct criminal contempt is handled ***immediately***, existing case law allows a summary procedure, which *probably* does not entitle defendant to appointment of counsel, advisement of rights, etc.;
3. Civil Contempt - civil contempt is only authorized if the defendant may escape incarceration by compliance - "has the key to the jailhouse door" - therefore, the right to appointed counsel should not apply in civil contempt.

5. 5 FORMS

A. Uniform Financial Affidavit and Appointment Order (Uniform Rules for the Superior Court § 29.3D)

IN THE STATE COURT OF _____ COUNTY
STATE OF GEORGIA

STATE OF GEORGIA CASE NO.
v. CHARGE(S):
_____

APPLICATION FOR APPOINTMENT OF COUNSEL AND
CERTIFICATE OF FINANCIAL RESOURCES

I am the defendant in the above-styled action. I am charged with the offens(s) of _____, which is/are misdemeanor's). I and/cannot afford to hire a lawyer to assist me. I do/do not want the court to provide me with a lawyer. I understand that I am providing the following information in order for the court to determine my eligibility for a court-appointed lawyer, paid by _____ County, to defend me on the above charges.

❑ In jail ❑ Out on bond Arrest Date _____

1. Name _____ Telephone No. _____

Mailing address _____

Birth date _____ Age ____ Soc. Sec. No. _____

Highest grade in school completed _____

2. If employed, employer is _____.
Net take home pay is (gross pay minus state, federal and social security taxes):
_____ (weekly) _____ (monthly)

3. If unemployed, how long? _____ List other sources of income such as unemployment compensation, welfare or disability income and the amounts received per week or month:
_____

4. Are you married _____ Is spouse employed? _____

If yes, by whom _____ Spouse's net income _____ (week)

5. Number of children living in home: _____ Ages _____

6. Dependents (other than spouse or children) in home, names, relationship, amount contributed to their support _____

7. Do you own a motor vehicle? _____ Year and model _____

How much do you owe on it? _____

8. Do you own a home? ____ Value _____ How much do you owe on it?_____

9. Amount of house payment or rent payment each month _____

10. List checking or savings accounts or other deposits with any bank or financial institution and the amount of deposits:_____
_____

11. List other assets or property, including real estate, jewelry, notes, bonds or stocks
_____

12. List indebtedness and amount of payments _____
_____

13. List any extraordinary living expenses and amount (such as regularly occurring medical expenses)_____

14. Child support payable under any court order _____

15. Do you understand that whether you are convicted or acquitted _____ County may seek reimbursement of attorney's fees paid for you if you become financially able to pay or reimburse the county but refuse to do so?_____

I have read (had read to me) the above questions and answers and they are correct and true.

The undersigned swears that the information given herein is true and correct and understands that a false answer to any item may result in a charge of perjury.

The _____ day of _____, 20____.

_____
Defendant's Signature

Sworn to and subscribed before
me this _____ day of _____, 20___.

_____
Notary Public
My Commission Expires _____

ORDER

Having considered the above matter, it is the finding of this court that the above-named defendant is/is not indigent under criteria of the Georgia Criminal Justice Act and appropriate court rules and is/is not entitled to have appointed counsel.

It is ordered that the clerk, panel administrator, or court administrator assign an attorney practicing in this county to represent the defendant in the above case.

Let the defendant and the assigned attorney be notified hereof and furnished a copy of this application and order.

This _____ day of _____, 20__.

_____
State Court Judge _____ County

B. Appointment of Private Counsel (where no public defender system) - ORDER

APPOINTMENT OF COUNSEL (PRIVATE)

TO: _____

Upon a preliminary determination of indigency, you are appointed to represent _____ in the above-styled case(s), having been chosen from the bar roster kept for this purpose.

OBLIGATIONS OF APPOINTED COUNSEL

1. Appointed counsel shall continue to represent a defendant until relieved by this court, the trial court, or an appellate court, or where a trial is had, upon the filing of a written statement that the defendant, if convicted, does not wish to appeal as hereinafter provided.

2. Following a trial conviction, appointed counsel shall advise defendant of his/her right to appeal and of his/her right to counsel on appeal. If requested thereafter to do so, counsel shall file a proper motion for new trial and, if the motion is overruled, perfect the appeal. His/her representation shall continue until he/she is relieved by this court, the trial court, or an appellate court.

3. If, at any time, it comes to the attention of counsel that the defendant is able to finance all or part of his/her defense, it shall be the duty of counsel to report this to the court then having jurisdiction of this matter for such further disposition as may be appropriate.

4. The court then having jurisdiction may substitute counsel where good cause is shown, and may at any time appoint additional counsel. Counsel may not substitute for each other at any time by agreement except upon the written concurrence of the defendant, which shall be filed with the clerk.

5. Appointed counsel may request and accept payment or promise of payment from or in behalf of the defendant for his/her services. Any such arrangement shall be promptly reported to the court then having jurisdiction.

Date:_____

_____
JUDGE, STATE COURT OF COUNTY

C. Appointment of Public Defender - ORDER

APPOINTMENT OF COUNSEL (PUBLIC DEFENDER)

TO: (Public Defender)

Upon a preliminary determination of indigency, you are appointed to represent _____ in the above-styled case in accordance with the duties of the Office of the Public Defender, _____ Judicial Circuit, State of Georgia.

OBLIGATIONS OF APPOINTED COUNSEL:

1. To represent a defendant until relieved by this court, the trial court, or appellate court, or where a trial is had, upon the filing of a written statement that the defendant, if convicted, does not wish to appeal as hereinafter provided.

2. To advise a defendant of his/her right to appeal a conviction and of his/her right to counsel on appeal; and if requested thereafter to do so, to perfect the appeal of the defendant. Representation shall continue until appointed counsel is relieved by a court then having jurisdiction of the case. If, upon conviction, the defendant decides not to appeal, he/she and his/her appointed counsel shall sign a statement to that effect and file it with the Clerk of the trial court.

3. The Court then having jurisdiction may substitute counsel where good cause is shown and may at any time appoint additional counsel.

4. To make a determination of the financial ability of a defendant to pay or reimburse, or partially pay or reimburse, the above-named county for the services of the Public Defender, and to require the payment of same.

5. If, at any time, it comes to the attention of counsel that the defendant is able to finance all or part of his/her defense, it shall be the duty of counsel to report this to the court then having jurisdiction of this case for such further disposition as may be appropriate.

Dated: _____

_____
JUDGE, STATE COURT OF COUNTY

D. Waiver of Right to Counsel during Trial

IN THE STATE COURT OF COUNTY
STATE OF GEORGIA

DEFENDANT:_____ CASE NO.:_____

WAIVER OF RIGHT TO THE ASSISTANCE OF COUNSEL DURING TRIAL

I am not under the influence of alcohol or drugs and am not suffering from any mental or physical disability.

I have been advised of and understand the nature of the charges against me, the maximum and minimum punishment provided by law, including the possible imposition of jail time, and my right to be represented by a private attorney, or by a public defender, if I am eligible. (Check one of first three lines ***and*** one of last two)

____ I have made application and understand that I **am not** eligible for the assistance of the public defender.
____ I have made application and understand that I **am** eligible for the assistance of the public defender.
____ I understand that I may qualify for the assistance of the public defender, but I have chosen not to make application.

____ I intend to hire a private attorney to represent me at trial.
____ I intend to represent myself at trial.

I have been advised by the Court of the dangers of proceeding to trial without the assistance of counsel and the possibility of a **jail sentence**. I understand that a lawyer might be able to discover and raise defenses to the charge(s) against me, discover weaknesses in the State's case, offer advice that might otherwise benefit me during my trial, and/or present circumstances in mitigation of any sentence which may be imposed.

I understand that I have the right to remain silent at trial, and **I am not required to testify** or offer any other evidence at trial. I will have to determine what witnesses to call and whether to testify without the advice of a lawyer. I will also have to handle juror questioning and selection by myself.

I understand that **I will be bound by the rules of evidence** and trial procedure during my trial even though I have not been trained as a lawyer.

I understand that appeals are for the correction of errors and to successfully appeal I must show an error made by the Court. Normally this requires a transcript showing a request by me that was turned down by the Court. In order to obtain a transcript, **I must request that my case be recorded and pay for the take-down** unless I am indigent (too poor to pay for it myself).

_____
Defendant Date

Faretta warnings given _____ _____
Date Judge, State Court of County

5. 6 SHOPLIFTING PLEA TRANSCRIPT (Upheld Example)

The following is a transcript of a guilty plea by an unrepresented defendant that was recently challenged and found satisfactory by the Court of Appeals in Hirjee v. State, 263 App. 185, 587 SE2d 144 (2003). The Benchbook Committee thought it would be useful for trial judges to see an actual upheld plea dialogue, but the Committee does not mean to imply that judges should not cover other matters in a plea, nor that every element in the transcript that follows must be individually covered with each defendant. (See approval of joint advisement of rights for 5 individuals in Iowa v. Tovar, 541 U.S. 77 (n.2) (2004)).

State vs. Fidahussein R. Hirjee
Case No. 2002-CR-06232
State Court of Clayton County, Georgia

PLEA AND SENTENCE

TRANSCRIPT OF PROCEEDINGS

THE COURT: Mr. Hirjee, I know I saw you the day before yesterday at your first appearance hearing, and now you're here for arraignment on that same shoplifting charge from the Home Depot. Do you remember that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, Mr. Hirjee, do you have an attorney to represent you on this case yet?

THE DEFENDANT: No, sir.

THE COURT: Mr. Hirjee, you understand you have the right to be represented by an attorney. If you cannot afford to hire a lawyer, you could ask me to appoint one for you if you met the financial eligibility requirements as established by the Supreme Court of Georgia.

Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Now, sir, do you want to proceed on today without an attorney? Or do you desire to be represented by a lawyer?

THE DEFENDANT: I wish to proceed.

THE COURT: Do you understand, sir, that you've been charged with accusation number 2002-CR-6232 with the misdemeanor offense of shoplifting. This offense is alleged to have occurred on the 14th day of May. The accusation says that you did by concealing merchandise to wit a package of hinges, having a value of three hundred (300.00) dollars or less and being the property of Home Depot, concealed them in your clothing with the intent of appropriating them just for your own use without paying for them.

You have the right to a speedy and a public trial by jury. The right to enter a plea of guilty or not guilty. The right to see, hear and cross examine all the witnesses that are called to testify against you and the right to use the power and process of this Court to compel the production of any evidence including the attendance of any witnesses on your behalf.

You do not have to testify nor produce any evidence against yourself and you have the right to make the State prove your guilt beyond a reasonable doubt.

You have the right to represented by an attorney, if you cannot afford to hire a lawyer you can ask me to appoint one for you if you met the financial eligibility requirements as established by the Supreme Court of Georgia.

If you were to enter a plea of guilty to this case today, Mr. Hirjee, you would be giving up all those rights and you could be sentenced, sir, as if you pled not guilty, stood trial and been convicted by a judge or a jury. The maximum punishment for this, sir, is a fine of up to one thousand (1,000.00) dollars and twelve (12) months to serve in the county jail or any combination of the two.

Do you understand what you're charged with?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand your rights as I've explained them to you?

THE DEFENDANT: Yes, sir.

THE COURT: How do you wish to plead to this charge?

THE DEFENDANT: Guilty.

THE COURT: If you'll sign the accusation where the prosecutor shows you.

Now, sir, has anyone threatened you, coerced you or intimidated you in any way in an effort to get you to enter your plea today?

THE DEFENDANT: *(Shakes head negatively.)*

THE COURT: You do so freely, voluntarily and of your own accord with the full knowledge of the rights as I've explained them to you?

THE DEFENDANT: *(Nods head affirmatively.)*

THE COURT: And, sir, are you currently under the influence of any drugs, medicines or intoxicants of any kind?

THE DEFENDANT: No, sir.

THE COURT: If you'll sign the document where Ms. Day, the state's attorney, shows you please.

(Whereupon, the defendant signed a document, after which the following transpired.)

THE COURT: Sir, what is your date of birth please?

THE DEFENDANT: December 2nd, '39.

THE COURT: And how far have you gone in school?

THE DEFENDANT: I have a college degree.

THE COURT: And are you a United States' citizen?

THE DEFENDANT: No, sir.

THE COURT: You understand that your plea to a criminal charge could have an adverse consequence on your immigration status?

THE DEFENDANT: Yes, sir.

THE COURT: And are you in this country legally?

THE DEFENDANT: Yes, sir.

THE COURT: And, sir, do you understand that a lawyer may have been able to assist you in discovering a defense to this case or in finding evidence to offer the court in mitigation of sentence?

THE DEFENDANT: I understand that.

All I want to say is that the value of the hinges was three dollars and some odd cents. And it was not intentional but I was there.

THE COURT: And you want to continue today without a lawyer, Mr. Hirjee?

THE DEFENDANT: Yes, sir. Fine.

THE COURT: Ms. Day, is there anything the State wants to add to the factual basis as it appears on the face of the affidavit contained in the record and other than what the defendant has already spontaneously said?

MS. DAY: No, Your Honor.

THE COURT: Is there anything the State would like to offer in aggravation?

MS. DAY: No, Your Honor.

THE COURT: Mr. Hirjee, is there anything you would like to say, sir?

THE DEFENDANT: In addition to what I just said?

THE COURT: Yes, sir. Anything else?

THE DEFENDANT: No, sir.

THE COURT: No?

THE DEFENDANT: No, sir.

THE COURT: All right.

Mr. Hirjee, I'm going to accept your guilty plea. I'm going to sentence you to serve twelve (12) months in the Clayton County Jail. I'm going to allow that time to be served on probation provided you pay a fine in the amount of three hundred (300.00) dollars and you perform forty (40) hours of community service. Plus it's going to be condition of this sentence that you do not return to the Home Depot in Morrow or any other Home Depot store in the State of Georgia for the next twelve months.

Do you have any questions, sir?

THE DEFENDANT: No, sir.

THE COURT: Mr. Hirjee, if there is nothing else holding you in the Clayton County Jail, you can be released within abut ninety minutes. Okay?

THE DEFENDANT: Yes, sir.

THE COURT: All right. If you'll go back with the deputy please.

Thank you very much.

(Whereupon, this concluded the hearing.)